

OPINION N°01/2020

from 07 July 2020

**Request for an opinion from the WAEMU Commission on the preliminary draft regulation on the sharing of powers and cooperation
between the WAEMU Commission and the national competition authorities of the Member States for the application of
Articles 88, 89 and 90 of the WAEMU Treaty**

The President of the Commission referred the matter to the WAEMU Court of Justice by letter No 07865/PC/DMRC/DCONC/ of 11 October 2019, which reads as follows:

"Mr President,

In accordance with Article 1 of Additional Protocol No. 1 on the supervisory bodies of the WAEMU, which mandates the Court of Justice to ensure "the observance of the law in the interpretation and application of the Treaty of the Union", I have the honour to request an additional opinion from the Court of Justice on the scope of Articles 88, 89 and 90 of the Treaty relating to competition rules.

Following differences of opinion between the WAEMU Commission and experts from the Member States as to whether or not the Union had exclusive competence to legislate in the three areas covered by Articles 88, 89 and 90 of the Treaty, i.e. cartels, abuses of dominant positions and State aid, the Commission requested the opinion of the Court of Justice by letter No 18886/PC/DPCD/DCC/499 of 26 May 2000.

In response, the Court's opinion no. 2003/2000 of 20 June 2000 emphasised:

- *"that the provisions of Articles 88, 89 and 90 of the WAEMU Constitutional Treaty fall within the exclusive competence of the Union";*
- *"Consequently, the Member States cannot exercise part of their competence in this area of competition".*

Notwithstanding this opinion, divergences in the interpretation of the above-mentioned provisions remain, in particular those relating both to the exclusive

right of Union bodies to legislate and, above all, to their exclusive competence to implement this substantive law.

These concerns are regularly raised by Member State representatives at the work of the WAEMU Council of Ministers, the meeting of WAEMU Trade Ministers, the WAEMU Committee of Statutory Experts and the WAEMU Consultative Committee on Competition.

In addition, at the 8th session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) of the United Nations Conference on Trade and Development (UNCTAD), held from 17 to 19 July 2007 at the Palais des Nations in Geneva, the voluntary peer review of the competition policies of WAEMU, Benin and Senegal resulted in the adoption of the following recommendations aimed at ensuring effective enforcement of competition rules:

- Develop the competition culture in the UEMOA area through appropriate media actions and information and training seminars for economic players and the general public;*
- adapting competition institutions in the Member States through reforms designed to assert their independence ;*
- develop procedures to enable a more equitable sharing of responsibilities.*

Based on the recommendations of this review, the Commission commissioned a study on the revision of the institutional framework for the implementation of the WAEMU Community competition rules.

The broad lines of reform and recommendations proposed by this study have been the subject of national consultation seminars in the Member States, which have clearly expressed their desire to achieve a rebalancing of competences in this area.

Following this study and national consultation seminars, several draft texts covering substantive, procedural and institutional law were drawn up.

One of these preliminary draft texts concerns the sharing of powers and cooperation between the Commission and the national competition authorities of the Member States, for the application of Articles 88, 89 and 90 of the WAEMU Treaty and therefore raises the question of its conformity with the provisions of the WAEMU Constitutive Treaty, in particular the provisions of Articles 88, 89 and 90 which had been interpreted in Opinion No. 2003/2000 of 20 June 2000 of the WAEMU Court of Justice as falling within the "exclusive competence of the Union".

This preliminary draft was examined by the Competition Advisory Committee at its 12th session, held in Ouagadougou from 9 to 12 June 2014.

Following this review, the Comité Consultatif de la Concurrence, in its Opinion No. 01/2014/CCC/UEMOA of 12 June 2014:

- *invited the Commission to continue its work, taking account of the suggestions for improvement made;*
- *hoped that solutions would be found to remove the legal obstacles linked to the provisions of the Treaty and its interpretation by the Court of Justice in order to adopt draft texts that take account of the guidelines defined by the Member States concerning the decision-making powers of the national competition authorities.*

To this end, I request the Court's opinion on the conformity of the attached preliminary draft Regulation on the division of powers and cooperation between the Commission and the national competition authorities of the Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty.

Yours sincerely

*For the President of the Commission
The Acting Commissioner
Essowe BARCOLA*

Enclosure: *Preliminary draft of the Regulations and its presentation note.*

The Court, sitting in Consultative General Assembly under the chairmanship of **Mr Daniel Amagoïn TESSOUGUE, President of the WAEMU Court of Justice**, on the report of **Mr Hervé DABONNE, Auditor** at the said Court, in the presence of Messrs :

- **Mr Salifou SAMPINBOGO, Judge;**
- **Ms Eliane Victoire ALLAGBADA Jacob, Advocate General;**
- **Mr Bawa Yaya ABDOULAYE, First Advocate General ;**
- **Mr Euloge AKPO, Judge ;**
- **Mr Augusto MENDES, Judge ;**
- **Mrs Joséphine Suzanne EBAH TOURE, Judge ;**
- **Mr Sangoné FALL, Court Auditor ;**

With the assistance of **Maître Boubakar TAWEYE MAIDANDA, Registrar** providing the secretariat, examined the above application at its sittings of 16 June 2020, 24 June 2020 and 07 July 2020.

THE CONSULTATIVE GENERAL MEETING,

- VU** the Treaty of the West African Economic and Monetary Union dated 10 January 1994, as amended on 29 January 2003;
- VU** Additional Protocol I on the WAEMU Supervisory Bodies;
- VU** Additional Act No. 10/96 of 10 May 1996 on the Statute of the Court of Justice of the WAEMU;
- VU** Regulation n°01/96/CM of 05 July 1996 on the Rules of Procedure of the Court of Justice of the WAEMU, in particular article 7 ;
- VU** Regulation No. 01/2012/CJ of 21 December 2012 on the Administrative Rules of the Court of Justice of the WAEMU;
- VU** Minutes No 02/2016/CJ of 26 May 2016 relating to the swearing-in and installation of the members of the WAEMU Court of Justice;
- VU** Minutes No. 2019-08/AI/02 of 28 May 2019 on the appointment of the President of the Court and the distribution of functions within the Court;
- VU** Minutes n°2019-09/AP/07 of 03 June 2019 relating to the installation of the President of the WAEMU Court of Justice;
- VU** Decision n°001-2013/CJ of 21 June 2013 on the Statute of Auditors of the WAEMU Court of Justice;
- VU** Order N°021/2019/CJ of 20 November 2019 fixing the days of the Assemblies of the WAEMU Court of Justice;
- VU** the request for an opinion from the WAEMU Commission, dated 11 October 2019, registered at the Registry of the Court of Appeal on 16 October 2019 under No 19 DA 006
- VU** the written observations of the Republic of Senegal dated 18 December 2019 ;
- VU** the written observations of the Togolese Republic dated 19 December 2019 ;
- VU** the written observations of the WAEMU Court of Auditors dated 24 December 2019 ;
- VU** the written observations of the Republic of Benin dated 26 December 2019 ;
- VU** the written observations of the Republic of Côte d'Ivoire dated 27 December 2019 ;
- VU** Order n°001/2020/CJ of appointing a Rapporteur; the documents in the
- VU** file;

The application was made in accordance with the provisions of the second paragraph of Article 27 of Additional Act No 10/96 on the Statute of the Court of Justice. This article provides that: "*The Court may issue opinions and recommendations on any draft texts submitted by the Commission*".

It should therefore be declared admissible.

I. PURPOSE OF THE CONSULTATION

The letter requesting an opinion from the President of the Commission seeks an additional interpretation from the Court of the provisions of Articles 88, 89 and 90 of the Treaty relating to the rules on competition, in the light of the persistent differences in their interpretation, notwithstanding Opinion No 003/2000 issued by the Court on 27 June 2000 (instead of Opinion No 2003/2000 of 20 June 2000 referred to in the request from the President of the Commission).

It emerges from this correspondence that the various concerns regularly raised by the representatives of the Member States relate in particular to :

- The exclusive right of the Union's bodies to legislate ;
- The exclusive competence of the same bodies to implement substantive law.

The representatives of the Member States have therefore called for a rebalancing of competences by means of consistent reforms of Community competition law, with a view to improving the level of implementation of legislation in this area. The ultimate aim would be to achieve a system of shared jurisdiction at all stages of the procedure, i.e. investigation, appraisal and decision.

The Commission, in its role as the Union's main competition body, and sensitive to the various concerns expressed, said it had previously commissioned a "study on the review of the institutional framework for implementing the WAEMU Community competition rules" in 2011. The conclusions of this study recommended that a number of reforms be initiated by the Commission to create a new institutional and legislative architecture at regional and national level, in order to ensure the effective implementation of Community competition policy.

In response to the various recommendations and following the advice of the Advisory Committee on Competition, the Commission says it has drawn up a preliminary draft text on the sharing of powers and cooperation between the Commission and the national competition authorities of the Member States, for the application of Articles 88, 89 and 90 of the WAEMU Treaty.

The preliminary draft Regulations comprise three chapters and twelve articles.

Chapter 1, which comprises Articles 1 to 5, determines the powers of the Commission, national authorities and national courts and the criteria for allocating them. In this respect, a distinction is now made between the effects of anti-competitive practices on trade between States and matters of Community interest.

Thus, Article 4.1 provides that: "*Where the practices referred to in Article 88 a) and b) of the WAEMU Treaty are likely to have an effect on trade between Member States, the Commission shall have exclusive competence...*".

Article 4.2 goes on to state that "*Where the practices referred to in Article 88 a) and b) of the WAEMU Treaty have effect only in the territory of a Member State, the national competition authority of that Member State shall have the power to take decisions on the contestation, cessation and possible punishment of the infringements.*

However, the Commission has jurisdiction where a question of principle or Community interest arises in a case with a national dimension".

Chapter 2, entitled "Cooperation", comprises articles 6 to 11 and sets out the framework for cooperation between the various players involved in competition, in particular the Advisory Committee, national courts and sectoral regulatory authorities.

The national competition structures will be set up as independent administrative authorities. They will henceforth be empowered to take decisions and have them approved by the Commission. Once approved, these decisions may be appealed before the WAEMU Court of Justice.

Finally, national courts will have jurisdiction to hear claims for damages caused by anti-competitive practices. They will be able to cooperate with the Commission by requesting detailed opinions on the matter.

The final chapter, which comprises a single article, is devoted to transitional, amending and final provisions, providing for a transitional period of 12 months before the new arrangements for the distribution of powers come into force.

As part of this procedure, the Commission has initiated the present request for an opinion, which essentially concerns the verification of the conformity of this preliminary draft with the provisions of the WAEMU Constitutive Treaty.

II. DISCUSSIONS

A. The scope of Articles 88, 89 and 90 of the Treaty

The points of divergence raised by the Commission in its application and relating to the exclusive competence of the Union bodies in competition matters have already been the subject of a reasoned opinion of the Court dated 27 June 2000. At the beginning of his letter, the President of the Commission alluded to the idea of a supplementary opinion on the same subject, certainly in relation to the concept of shared competence inserted in the preliminary draft Regulation.

However, it is inappropriate to re-examine the question of the exclusive competence of the Union's institutions in competition matters, given that, since the Opinion of 27 June 2000, no new legislation or case-law and no Community event has called into question the Court's interpretation of the scope of Articles 88, 89 and 90 of the Treaty.

In any event, the question of the exclusive competence of the Union's bodies in the field of competition law, as developed in the above-mentioned opinion of the Court, remains topical; for this reason, there is no need to discuss the established contours again.

B. On the preliminary draft Regulation on the division of powers and cooperation between the Commission and the national authorities

According to Article 1, the purpose of the preliminary draft is "*to determine the respective areas of intervention of the WAEMU Commission and the national authorities of the Member States, as well as the modalities of their cooperation for the application of competition rules within the Union*".

An analysis of the provisions of the preliminary draft Regulation, in particular all the recitals and Chapter 1, shows that the Commission and the Member States do indeed share powers in the application of Articles 88, 89 and 90 of the Treaty.

From a terminological point of view, shared competences can be defined as areas in which both the Union and the Member States can act, although the latter can only exercise their competence to the extent that the Union has not exercised its own.

According to the Commission, the legal basis for this preliminary draft division of powers is based on the following provisions of the Treaty: articles 4a), 5, 26, 76 c), 88, 89 and 90.

However, there are a number of points to be made about the grounds on which the principle of shared powers is based in law.

The first is that there can be no sharing of powers in the field of competition without an express provision in the Treaty, having regard to the principle of exclusivity already set out in the opinion of 27 June 2000.

By way of comparative law, we might mention the Treaty on the Functioning of the European Union, Article 4 of which lays down not only the principle of the sharing of powers between the Union and the Member States, but also the precise areas in which this sharing is to be exercised. Long before this instrument, it should be remembered that the provisions of other earlier Treaties, in particular the Treaty of Rome (Articles 85 and 86) and the Maastricht Treaty (Articles 81 and 82) and the case law of the European Court of Justice (see Case 14/68 *Walt Wilhem v Bundeskartellamt* of 13 February 1969, ECR 1) had also helped to settle the question of the distinction between the competence of the Union and that of the Member States in competition matters, based in particular on the relevant geographic market.

This distinction has enabled Member States to have their own national competition law which coexists with Community law and is dependent on it in terms of scope, content and inspiration. The evolution of the process has been consolidated through the enactment of secondary legislation which now allows for the decentralisation of the application of Community competition law to enable Community sanctions to be applied immediately by national authorities and courts.

On analysis, this situation is different from that which prevails in the WAEMU area, where the Treaty has been interpreted in the sense of conferring exclusivity on the Union's bodies in competition matters; it therefore follows that the rules of secondary legislation, intended to implement this matter, must follow the same regime.

In so doing, the principle of subsidiarity presupposes the existence and distribution of competences between the Union and the Member States and therefore makes it possible to determine whether or not an existing competence can be exercised at Community level. In any event, this principle only applies to concurrent competences, i.e. competences shared between the WAEMU and the States. The basis for its extension is therefore questionable in the field of exclusive competences.

For this reason, Articles 5 and 26 of the Treaty cannot be used as a basis for sharing competences in the area of competition between the bodies of the Union and the Member States of the WAEMU.

The second observation relates to the meaning of the provisions of Article 90 of the Treaty, concerning the Commission's power to take decisions on the application of the competition rules.

This provision cannot be seen as allowing the Commission to decide how to share its exclusive prerogatives in competition matters with the national competition authorities.

In the case in point, the Treaty has not conferred this type of decision-making power on the Commission, given the exclusive competence of the Union's bodies in this area.

The power of decision conferred on the Commission and highlighted in Article 90 establishes in its favour only a power to apply the legislation provided for in Article 89. In other words, the Commission has the power to control cartels, abuses of dominant positions and state aid. This is an administrative power, not a legislative one, which can be used to implement the competition procedure.

Following the opinion issued on 27 June 2000, the Commission adopted three regulations and two directives in accordance with Articles 89 and 90 of the Treaty. These instruments were intended to enhance the efficiency and competitiveness of Member States' economic and financial activities in the context of an open and competitive market and within a framework of cooperation with EU bodies.

In addition, and contrary to the Court's opinion of 27 June 2000, the preliminary draft Regulation makes a distinction in the application of the competition rules between the national and Community spheres (see Article 4 above).

The sixth recital expresses this in the following terms: "*Whereas it is, however, possible to confer jurisdiction on national competition authorities to deal with anti-competitive practices where these do not affect trade between Member States, without prejudice to the Commission's jurisdiction in cases raising questions of principle or of Community interest*".

However, according to the above-mentioned opinion, "*the Dakar Treaty, contrary to the provisions of Article 87(2)(e) of the Treaty of Rome, did not feel it necessary to entrust the Commission with the task of defining the relationship between national legislation and Community competition law, no doubt because of the exclusive competence reserved to the Union in the area of competition law, which is an integral part of the WAEMU Common Market*".

As a result, the preliminary draft Regulation encroaches on the field of the Treaty, whereas under no circumstances can a Regulation replace the Treaty, but rather complement it in its application without modifying its letter or spirit. In other words, as an act of secondary legislation inferior to the Treaty, a Regulation cannot act in an area reserved for the Treaty. It can only apply the principles that these rules have already laid down.

Lastly, the division of competence envisaged in the preliminary draft Regulation will have the fundamental effect of redefining the contours of the institutional basis and procedural arrangements of EU competition law. It is inconceivable a priori to envisage a reform on this scale if it has not been formally provided for in the Treaty.

Such a gateway would not only allow the principle of exclusivity to be breached, but would also render it meaningless in terms of the prerogatives granted to EU bodies in the field of competition law.

In the current state of WAEMU law, such a reform would require the relevant provisions of the Treaty to be amended to expressly include the principle of sharing competences and the areas concerned.

III. CONCLUSIONS

The powers conferred by the Treaty on the Community bodies to legislate and implement substantive law within the Union remain powers of attribution.

They imply that the Union and its bodies can only act within the framework of the powers conferred on them respectively.

It is with this in mind that Article 90 of the Treaty expressly entrusts the Commission with the procedural implementation of Community competition law, it being understood that the Commission may define mechanisms for cooperation with other players within the Union (*cf. Directive No 02/2002/CM/UEMOA of 23 May 2002 on cooperation between the Commission and the national competition structures of the Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty*).

Consequently, in order to strengthen the role of national competition authorities in optimising the application of competition rules in the Union, structural reforms should be made upstream in primary law. In other words, redefining powers between the Commission and the Member States requires a prior revision of the Treaty.

In view of the foregoing, the Court is of the opinion that :

- **The preliminary draft Regulation drawn up by the Commission and relating to the sharing of powers and cooperation between the Commission and the national competition authorities of the Member States for the application of Articles 88, 89 and 90 of the WAEMU Treaty does not comply as it stands with the provisions of the said Treaty.**
- **That, consequently, a prior revision of the above-mentioned relevant provisions of the Treaty is necessary to remove the inherent legal obstacles.**

And signed by the Chairman, the Reporter and the Registrar.

Illegible signatures follow.

Ouagadougou, 09 July 2020

The Registrar

Boubakar TAWEYE MAIDANDA